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Nuisance and the Beach: How Much Control Should a State Exercise Over Beach Fire Rings?

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The involvement by regulatory agencies in the day-to-day activities of ordinary people that affect their quality of life is clearly increasing. Whether this is a function of higher density living situations or simply an inexorable evolution of government and the way people relate to each other, it is happening now. Probably one of the most obvious examples of this trend is the July 12, 2013, decision by the State of California's South Coast Air Quality Management District in Southern California to strictly regulate and, in some cases, outlaw the use of beach fire rings for recreational use. As is so often the case, the complaints of some of the neighbors in a dense area was the catalyst for the new regulatory framework and the intrusion. As the *Los Angeles Times (The Daily Pilot)* put it:

> *In what could be the end of an extensive debate that pitted concerns about wood smoke's health impacts against a beloved Southern California tradition, members of the South Coast Air Quality Management District voted 7 to 6 to approve a rule that will place new restrictions on the use of beach fire rings… The AQMD vote followed an hours-long parade of local officials, state legislators and Orange County residents pitching in their two cents, even as Board Chairman William Burke tried*

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to speed the meeting along by asking fire ring supporters to speak only if they felt a "burning" need.

For the majority of the speakers—some of whom sported black T-shirts with "Save our bonfire rings," printed on them in white lettering—the proposal that staff members deemed a compromise based on public input was still too much regulation. "These beaches are regional," said Costa Mesa Mayor Jim Righeimer. "If you're up and down the 55 [Freeway], you don't go to Huntington Beach.' Costa Mesans—like many others living along the 55 corridor, which pours drivers heading for the coast directly into Newport Beach—enjoy bonfire access close to home," he said.

But for Newport residents living yards away from the beach, like Frank Peters, who has been one of the fire's most outspoken critics, the vote was a victory. "I'm pinching myself," he said, after the meeting. "It's been a long journey." [1]

The reverberations of the story reached all the way to New York. In a May 30, 2013, news article in the *New York Times*, Ian Lovett, its staff writer wrote, "Is 'No Fun' Sign Next? California Beach Bonfires May Be Doused." Lovett frames the debate well:

For generations, California's beaches have been an international symbol of free living and youthful exuberance, where Gidget met Moondoggie and the Beach Boys had fun, fun, fun.

But these days, a blizzard of restrictions—on everything from dogs to playing horseshoes—is being imposed on beach activities up and down the coast, turning beaches into sanitized zones that longtime beach goers say barely resemble the freewheeling places they once knew.

Smoking is banned at many beaches across the state. On San Diego beaches, playing ball or tossing a Frisbee has been outlawed. Alcohol is no longer allowed on the sand in Hunting-

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ton Beach. Even surfing is restricted to designated areas here, though this is "Surf City."

And the next thing to go could be the fire pits—concrete rings designed to contain bonfires—which for many people are enduring features of a free, outdoor California lifestyle.

"I go the beach today, and there are signs that say, 'No drinking, no glass, no this, no that,'" said Jane Schmauss, 68, a historian at the California Surf Museum. "I want to write 'No fun' at the bottom, because that's going to be the next thing they outlaw. Or 'No laughing.'"

The New York Times article continues by giving specifics and details of the AQMD's action and also some of the economic fallout from it:

The fire pits were installed decades ago as a safer alternative to the open fires that were once allowed. But regional air quality regulators have determined that wood-burning fires contribute to air pollution and pose health risks for those who live nearby, and last month they proposed removing more than 800 fire pits that dot the coastline of Los Angeles and Orange Counties, the heartland of Southern California beach culture…

Joe Shaw, a city councilman in Huntington Beach, said the tradition of gathering around fire pits at night "epitomizes the California dream of so many." Each weekend, scores flock to Huntington Beach's more than 500 fire pits, which bring in an estimated $1million annually for the city in parking fees alone. [2]

California has often been considered the "canary in the coal mine" in expanding the scope and reach of regulatory action; people look to that state for trends in land use planning and regulatory actions. The interesting question here is whether this act of removing some and then heavily regulating remaining coastal beach fire rings is a harbinger of more regulation to come nationwide at the state level or simply an anomaly.

The best place to start in determining whether this overlay of regulation is necessary or likely to expand nationwide is to look at the growth and development of underlying common law on the point.

Beach fire rings, like many activities conducted in a public area, may have hazards associated with them; here, the flames and the burning are, to some extent, a nuisance as well as the smoke that the fire emits. Common law applied by the Federal courts gives injured parties a remedy under the Federal Tort Claims act to be compensated if a Federal agency, in performing its obligations, falls below the standard of care. The 1990 case of *Summers v. United States* was just such a case; it involved a minor injuring her foot on property operated by the National Parks Service when she burned her foot on coals on a beach fire ring. The injury occurred on August 9, 1984, during a visit to Rodeo Beach, part of the Golden Gate National Recreation Area. The child was four and one-half years old and was walking with her family when they came upon a sign showing a symbol of logs aflame and an arrow pointing to the nearby beach. Upon reaching the beach, the child received her parents' permission to take off her shoes and started to walk ahead. She then attempted to balance herself upon a rock which was part of a fire ring, but lost her balance and burned her foot on hot embers within the fire ring.

The case itself went into some detail about changing conditions causing a need for changing policy:

For some time prior to Kendra's injury, fires were permitted at any location on Rodeo Beach. In response to concerns about alcohol abuse and vandalism by teenagers who built fires on remote areas of the beach, the Park Service changed its policy to confine beach fires to three fire rings located close to and easily observable from the road. After the installation of the fire rings, the rangers noticed that some visitors continued to build fires outside the fire rings and posted the sign warning that fires were permitted only in the fire rings. [3]

The Summers court found that the Park Service's failure to warn of the potential danger of stepping on hot coals didn't contravene a prescriptive Federal statute, regulation or policy. The court looked at

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the failure to warn as possibly constituting liability for negligence by the National Park Service:

> *The government claims that Park Service decisions regarding the placement and particulars of park signs fall within the broad discretionary authority delegated to the Park Service by Congress to carry out the Park Service's dual mission of promoting public use of the national parks while preserving them for the enjoyment of future generations… The government characterizes the Park Service sign policy as an exercise of discretionary judgment balancing the demands of the dual mission: the Service limits park signs to the minimum number and size necessary for adequate warning and guidance to the public in order to conserve the scenery of the parks for future visitors.*
>
> *There is no evidence, however, that NPS's failure to post warnings of the sort that would have prevented Kendra's injury was the result of a decision reflecting the competing considerations of the Service's sign policy. As we indicated in* Lingren v. United States [Lindgren v. U.S., 665 F.2d 978, 65 A.L.R. Fed. 350 (9th Cir. 1982], *a governmental failure to warn is not necessarily shielded from suit simply because a discretionary function is in some way involved. On the contrary, we have concluded that 'where the challenged governmental activity involves safety considerations under an established policy, rather than the balancing of competing policy considerations, the rationale for the exception falls away and the U.S. will be responsible for the negligence of its employees."*[ARA Leisure Services v. United States, 831 F.2d 193, 195 (9th Cir.1987) (quoting Aslakson v. United States, 790 F.2d 688, 693 (8th Cir.1986)] [4]

California state law, in a 2001 appellate case, *Sambrano v. City of San Diego*, 94 Cal.App.4th 225, 114 Cal.Rptr.2d 151 Cal.App. 4 Dist., 2001 interestingly, holds the reverse:

> *Plaintiff and appellant minor Leana Maria Sambrano, by her guardian ad litem Art Sambrano, et al., sued defendant and respondent City of San Diego (the City) for personal injuries suffered when she climbed into and was burned in a fire ring containing sand-covered hot coals at a beach park owned and operated by the City… The trial court granted summary judgment in favor of the City on the ground that, as a matter of law, the condition of the park fire ring was not a dangerous condition of public property. (Gov. Code §§ 830, 830.2, Code Civ. Proc., § 437c, subd. (c).)… The facts are essentially undisputed. Plaintiff Laurie Sambrano brought her daughters to a family reunion at the De Anza Cove beach park in Mission Bay, San Diego on August 1999. Family members had arrived around 8:00 that morning and had staked out a fire ring on the beach sand by placing chairs, wood and toys there to show they intended to use it later. The fire "ring" was about five feet wide and consisted of six-inch thick concrete walls that extended above the sandy surface to a height of 15 inches. There was no active fire, only sand and ashes, visible within the fire ring.*
>
> *After lunch, the youngest daughter, almost-two-year-old Leana Sambrano, was being watched by her 12-year-old sister and her great aunt while she swam and played. Leana was playing with her cousins on the sand about a foot or two away from the fire ring wall. Suddenly, those present heard screaming from the fire ring as Leana moved away from it. There were little footprints in the fire ring and Leana had third degree burns on her feet. She was treated and required skin grafts to heal the burns.*

The Sambrano court applied California statutory law and found no liability for the municipality:

> *A public entity may be liable for injuries caused by a dangerous condition of its property.* [Sambrano v. City of San Diego, 94 Cal. App.4th 225, 233, 114 Cal.Rptr.2d 151 Cal. App. 4 Dist., 2001]. *Under section 830, subdivision (a), a "dangerous condition" is defined as "a condition of property that creates*

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a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used."

Section 830.2 provides a qualification to the definition of a dangerous condition of public property, by stating: "A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." [5]

So now the stage is set. Dangerous or defective conditions that a public entity allows to occur on public property may or may not give rise to that entity's liability depending on the jurisdiction and its laws. Does allowing smoke from fire rings to be generated and thus inhaled by persons in proximity to it give rise either to municipal liability or, for that matter, nuisance liability as against the person or persons generating the fire itself?

To find a general definition for what constitutes a nuisance is not easy; the factors themselves are pretty nebulous. American Jurisprudence, 2nd Edition, probably has as settled an explanation as any:

§ 58 Generally; claim based on federal common law.

There is no exact rule or formula by which the existence of a nuisance may be determined. Each case must stand on its own facts and special circumstances. In general, however, as long as the defendant's activities are reasonable and do not occasion an unnecessary risk of harm or annoyance to others, they do not constitute an actionable nuisance. In one state [Connecticut], a plaintiff must prove four elements to succeed in a nuisance cause of action: (1) the condition complained of had a natural tendency to create danger and inflict injury on person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; and (4) the existence of the nuisance was the proximate cause of the plaintiff's injuries and damages." [6] (emphasis added)

The Restatement of Torts 2nd defines public nuisance as:

1. *A public nuisance is an unreasonable interference with a right common to the general public.*
2. *Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:*
   - *a. whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or*
   - *b. whether the conduct is proscribed by a statute, ordinance or administrative regulation, or*
   - *c. whether the conduct is of a continuing nature or has produced a permanent or long lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right."* [7]

Armed with this somewhat fuzzy framework, how do different jurisdictions react to fire rings emplaced on their beaches and the activity that people engage in in burning combustible material in them?

Surprisingly, most of the jurisdictions in the United States are in harmony. A small example: the East Hampton Town Board in the State of New York has approved a change to the town code that limits beach fires between the hours of 5:00 p.m. to 12:00 midnight:

> "We're not anti-beach fire," Johnson insisted, "but some regulation has to be in place. According to the current code, all fires must be 50 feet from any combustible materials, including tents, fences and vegetation, and cannot be

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larger than two feet by two feet. (Fires of greater dimension are considered bonfires or 'open burning' and require a burning permit.)"[8]

The State of Oregon probably has the most typical regulatory framework for this issue. In a September 18, 2013, interview with the author, Robert Vance of the Department of Environmental Quality for the State of Oregon, drew out the information, later substantiated, that *the State of Oregon does not have a specific regulatory framework for beach fire rings, but has devolved the responsibility for regulating the activity onto local municipalities*. Vance himself had recently visited the city of Rockaway Beach, Oregon for a vacation and was permitted to build a beach fire without the necessity of a permit. That city provides a "fire pit permit" for fires located on private property. The Department of Environmental Quality in Oregon is more concerned with "outdoor burns" that involve, as they put it:

Wet garbage; plastic; asbestos; wire insulation; automobile parts; asphalt; petroleum products; petroleum treated materials; rubber products; animal remains, or animal or vegetable matter resulting from the handling, preparation, cooking, or service of food; of any other material that emits dense smoke or noxious odors when burned… [9]

The same is essentially true in the State of New York, but there is a more explicit statutory framework. In its "Revised Regulatory Impact Statement" for Open Fires, Forest Fire Prevention, and Uniform Procedures (6NYCRR 215, C NYCRR 191, and CNYCRR 621), the state legislature in New York makes clear the detrimental activity that it is trying to regulate:

The Department has the power, as provided for in the Environmental Conservation Law, to formulate, adopt and promulgate, amend and repeal codes and rules and regulations for preventing, controlling or prohibiting air pollution in a manner consistent with that policy. In furtherance of that policy and the Legislature's objectives, the proposed rule amendments will further limit toxic emissions and be protective of public health by prohibiting the open burning of residential solid waste in all cities, villages and towns across the State. This rulemaking also prohibits the open burning of yard waste in portions of the state. [10]

The State of New York explicitly allows "campfires less than three feet in height and four feet in length."[11] This standard essentially comports with the town of East Hampton's regulations contained in its Municipal Code Section 141-19A. It defines a beach fire as:

An outdoor fire burning wood materials other than rubbish on a beach where the fuel being burned is not contained in an incinerator, outdoor fireplace, barbeque grill, or barbeque pit, and has a total fuel area of thirty (30) inches or less in diameter and twenty four (24) inches or less in height from natural grade for pleasure, religious, ceremonial, cooking, warmth or similar purposes.

The State of Washington is in accord with its statutory framework, too:

RCW WAC 173-425-050. Definition: Recreational fires or outdoor burning of charcoal or firewood (not debris or rubbish) where the fuel is not contained in an incinerator, outdoor fireplace, barbeque grill or barbeque pit. Recreational fires are for pleasure, religious, ceremonial, cooking, warmth or similar purposes. Fires used for debris or rubbish disposal are not considered recreational fires and are illegal… The International Fire Code indicates that total fuel area for the fire may not exceed three feet in diameter or two feet in height.[12]

Randall Miller, an environmental supervisor with the Air and Solid Waste Program of the Florida Department of Health, Palm Beach County, in an interview with the author of September 19, 2013, related that *Florida has no statewide ban or regulation of beach fires*. In point of fact, as with the other coastal states of Oregon, Washington, North Carolina, and New York, this responsibil-

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ity has been devolved onto the local municipalities. Florida maintains a "nuisance dust rule" in its Florida Administrative Code, Section 62-296.320, and its Florida Statute 403.161(1)(a) that gives the state the ability to regulate fires in general that emit pollutants but grant the following exemption:

> *Section 12-81. Miscellaneous allowed open burning. A campfire, bonfire, or other fire will be allowed that is used solely for recreational purposes, for ceremonial occasions, for outdoor noncommercial preparation of food, or on cold days for warming of outdoor workers as long as excessive visible emissions are not emitted.* [13]

How did the State of California treat this issue? Interestingly, it changed an existing rule that allowed exactly the same kinds of fires that all of the other states did.[14]

> *Under the State open burning rule, campfires and fires for festive/ceremonial occasions are allowed as long as they don't burn manmade materials or logs larger than six inches in diameter.* [15]
>
> *Outdoor burning shall burning shall be authorized for fires used solely for recreational ceremonial purposes, or in the non-commercial preparation of food, or used exclusively for the purpose of supplying warmth during cold weather…* [16]

California's "detour" from the orthodoxy of the other states and, for that matter, its prior rule actually started in or about May of 2013. At that time, the South Coast Air Quality Management District was responding to complaints of noxious smoke and fumes from beachfront homeowners in the city of Newport Beach, a wealthy enclave in Orange County, California, approximately one and one-half hours south by car from Los Angeles. As the staff report for the July 12, 2013 AQMD hearing put it:

> *There are approximately 765 beach fire rings in Los Angeles and Orange counties with the overwhelming majority (approximately 90 percent) along the Orange County coastline. Smoke emissions from these devices have recently come to the attention of SCAQMD staff through formal actions by the City of Newport Beach. Specifically, in March of 2012 the Newport Beach City Council voted to direct City staff to take the necessary steps to remove beach fire rings at Big Corona and Balboa Pier beach areas. A coastal development permit application … was subsequently prepared by City staff and submitted to the California Coastal Commission … for approval to remove the rings. According to the Commission's staff report, one of the City's reasons for fire ring removal was health impacts from wood smoke; however,* ***the City acknowledge[s] that there were no direct studies of health effects associated with fire ring use, nor is there any current regulation restricting such use****. Although the item was continued at a March 2013 meeting and no formal action was taken, the Commission's staff recommendation was to deny the request. In its denial justification of the City's request, Commission staff cited the exemption for recreational burning in SCAQMD rules.* [17]*(*emphasis added*)*

What's interesting about the amended rule is not only what was added but, more importantly, what was removed. Rule 444 was amended to ***remove*** **this** language in its Paragraph 5A and B:

> *The provisions of this rule shall not apply to: A. Recreational fires or ceremonial fires, including fires conducted pursuant to United States Code, Title 4, Chapter 1 Section 8, B. Open burning of natural gas, propane, untreated wood, or charcoal for the purpose of: (i) preparation or warming of food for human consumption; or (ii) generating warmth at a social gathering.*[18]

The report's summary delineated very clearly what the changes were:

> *The proposed amendments would prohibit beach burning activities after March 1, 2014 in areas within 700 feet of a residence unless the rings were spaced at least 100 feet apart*

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or at least 50 feet apart if there are no more than 15 fire rings per contiguous beach area within the city's boundaries…. The amendments would also clarify that the proposed amendments are only applicable to fire rings located on beach sand in coastal areas (adjacent to the ocean)…. [19]

All of the changes adding these requirements were added to Rule 444, Subparagraph D.3.G1 and 2. The staff report went into some depth as to the changes, and inadvertently revealed how focused and targeted the removal of the fire rings to Newport Beach would be, as they were the complaining party:

Under the above proposed rule language for subparagraph (d)(3)(G), Dockweiler State Beach, Huntington City Beach, and Bolsa Chica State Beach are not expected to be affected by the criteria other than the no-burn days. However, the proposal may affect the other beaches in that some fire rings would have to be moved or removed at the various beaches. For example, the 700 foot buffer would require Huntington State Beach to move or remove an estimated 30 fire rings that are less than 700 feet from a mobile home park, although some fire rings may be able to be retained within 700 feet if the rings are at least 100 feet apart from one another. Corona del Mar State Beach and Balboa Beach fire rings are all currently located within 700 feet and would have to either be removed or moved elsewhere. Doheny State Beach would be the most heavily impacted whereby all day-use fire rings are within 700 feet of residences. Due to the modified definition of beach burning, only the fire rings on the sand in the southern two-thirds of the campground will be impacted." [20](emphasis added)

The report itself also contained a table detailing the issues raised by opponents of the changes in the rule and the staff's response. The issue raised by the opponents of regulation was delineated as follows:

The PAR 444 provision to prohibit open burning at beach areas has generated significant comments on either side of the issue. Some have expressed support for the proposal due to odor and health effects from wood smoke. Others have stated that the proposal is unneeded as emissions from beach burning are very minor. Several cities have voiced strong opposition and believe the rule is unnecessary. A number of parties have urged a policy that allows cities to decide for themselves whether beach fires should be allowed. Local governments and businesses in communities with beach fire rings are anticipating a loss of revenue from a reduction in beach fees and product sales.

The staff's response didn't address any of these issues:

PAR 444 beach burning provisions would protect the public health of beach goers and the surrounding community by reducing the exposure to wood smoke. These provisions would not apply to the use of charcoal, gaseous, or liquid fuels. A demonstration project is under consideration to identify a low emission open burning alternative that would allow continued use of beach fire rings beyond the January 1, 2015 wood burning prohibition.[21]

Now we get to the nub of the issue; one community, in essence, dictated to others a standard that, truthfully, only applied to it. The news stories and prior history of the dispute make clear that, when the California Coastal Commission wasn't willing to remove the fire rings, the city of Newport Beach resorted to the only avenue it had left, to complain that the smoke was "a nuisance" and a health hazard.

The big question is, though, was it really a nuisance, either under common law or under the technical template that the South Coast Air Quality Management District applied to it?

California statutory law, like the general common law set out in American Jurisprudence 2d, doesn't do a very good job of defining what a nui-

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sance is; the definition is so nebulous as to potentially even cover bursts of noise such as fireworks or the emission of foul odors from a septic tank that has not been cleaned but needs to be:

> *§ 3479. Acts Constituting Nuisance. Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.* [22]

California law expands the nuisance definition to include a public nuisance, but it isn't any more specific than the underlying section:

> *§ 3480. Public Nuisance. A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.* [23]

Finally, private nuisances are simply defined as:

> *§ 3481. Private Nuisance. Every nuisance not included in the definition of the last section is private.* [24]

This doesn't really give much guidance. The Air Quality Management District relies, in its staff report and the eventual adoption of the amended rule, also on Health & Safety Code § 41700, which is part of California's Clean Air Act:

> *§ 41700. Prohibited discharges; Adoption of rule or regulation. (a) Except as otherwise provided in Section 41705, a person shall not discharge from any source whatsoever quantities of air contaminants or other material that cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public, or that endanger the comfort, repose, **health**, or **safety** of any of those persons or the public, or that cause, or have a natural tendency to cause, injury or damage to business or property….*

On a nationwide scale, American Law Reports would indicate that, not only are beach fires not really considered something that should be regulated by air pollution standards, but that the property authority to do so would, in any event, be a municipality:

> *Except in a few cases, particularly earlier ones, smoke control regulations, whether directly prohibiting the emission of smoke or regulating the supply and use of smoke-producing fuel, have ordinarily been held valid as a proper exercise of the police power….*
>
> ***Smoke control ordinances are ordinarily within the statutory and charter power of municipal corporations**. A proper delegation of power to administrative agencies authorizing them to carry out details and to issue, within proper standards fixed by the legislature, rules and regulations, and such rules and regulations, has ordinarily been sustained as valid."* [25](emphasis added)

The same American Law Reports article summarizes the general state common law, again, to reinforce the inference that this is the type of problem that municipalities should be regulating:

> *Statutory and charter power of municipal corporations. A municipal smoke ordinance is valid only if the municipality has, either under a general statute or under its charter, the power to enact such an ordinance. Ordinances of this kind have ordinarily been upheld as within the statutory or charter power of the enacting municipality, it making no difference whether the municipality was authorized in specific terms to enact smoke control ordinances or in general terms to enact ordinances for the welfare and health of its inhabitants.* [26]

While the AQMD's staff report went into great detail discussing harmful effects of wood smoke

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and fine particulate matter in general, it admittedly did little or no study of the specific deleterious effects of the beach fire rings:

> *GR-8: The beach fire rings are not a significant source of air pollution and should not be regulated. There are many other sources of air pollution that should be regulated. The fire rings are a southern California tradition and should be preserved for future generations.*
>
> *Staff Response: As noted in the staff report, wood smoke poses a potential health exposure risk to beach goers and nearby residents. Wood smoke from beach fires can affect the public health and is a local exposure risk to the surrounding community. This is further magnified as many of those using the fire rings have been observed burning materials other than fire wood. Federal, State and local air pollution regulations have been implemented for all forms of particulate pollution and every effort continues to be made to address emissions from all source categories. Low emission alternatives, such as use of gaseous fuels, may be a potential solution that would allow the continued use of fire rings in Southern California.* [27]

The appendix also listed a public comment and a staff response that was quite significant:

> *Comment 27: Emissions from beach fire rings have a negligible effect on air quality or public health. The localized significance threshold (LST) for sensitive receptors and/or EPA's New Source Review (NSR) limits should be used to determine the significance of emissions from beach fire rings.*
>
> *Staff Response: It is acknowledged that beach fire emissions are not a large contributor in terms of regional emissions but the PAR 444 beach burning provisions would have been proposed to address **localized** impacts. The LST threshold is used by AQMD staff for individual sources but not for rule development/amendment projects. NSR is used in conjunction with the permitting of stationary sources not for analyzing potential impacts from area sources such as open burning. Results of air quality sampling downwind from beach areas is a more appropriate indicator of potential public health impacts.*

This note is quite telling; AQMD admits that the impacts, at best, are localized. If this is a public nuisance under California Civil Code and Federal Common Law, how large a group of the public is being affected by it? If in fact the impact is truly localized, how and why would a state entity become involved given the predisposition under current common law for municipalities to locally regulate this issue?

The inescapable conclusion here is that California has parted ways with long-established law and policy to "stick its nose" into what has been clearly a local issue. The overwhelming majority of state jurisdictions with coastline cede the authority and responsibility for monitoring beach fire rings to local municipalities. The gravamen of their regulation, even at the local level, has to do with safety, the prevention of a larger fire, and prevention of injuries to others.

While case law regulates fire rings as an attractive nuisance in burn cases, as this article has pointed out, the nuisance issue there isn't the actual combustion and smoke emissions, but the potential for harm to people or animals that "stumble" upon the fire rings while there is still hot material in them. The political motive in this administrative action by the AQMD is clear; a small, well-financed group of homeowners petitioned its own municipality to stop the fire rings. When a state agency, the Coastal Commission, refused to cooperate, rather than declaring the fire rings a local nuisance, the City "punted" and asked Air Quality Management District to step in. The unsettling precedent that this action set will most likely be watched closely nationwide by other municipalities, particularly ones where a disparity in wealth and access to a resource such as public beaches is sacrificed in favor of a small group of residents.

A clear imbalance is therefore created; a very good case can therefore be made that the AQMD edged into "overregulation" as a result of pressure put upon it politically rather than respecting

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the boundaries and balance of state versus local control and requiring the local municipality to resolve the problem itself. This author can foresee this tactic being used in other areas, certainly throughout the state of California and most likely in other jurisdictions, by unhappy local citizens who are unable to persuade their municipality that this type of fire activity should be regulated locally. The larger question is whether this trend is a salutary one.

NOTES

1. Orange Coast Daily Pilot, Wednesday, July 17, 2013. "AQMC approves new fire rings rule" by Jill Cowan at http://www.dailypilot.com/news/tn-dpt-me-0713-aqmd-fire-rings-20130712,0,2984673.story.
2. "Is 'No Fun' Sign Next? California Beach Bonfires May Be Doused" by Ian Lovett, May 30, 2013. http://www.nytimes.com/2013/05/31/us/pollution-concerns-could-douse-california-beach-fires.html?pagewanted=all&_r=0.
3. *Summers v. U.S.*, 905 F.2d 1212, 1214, C.A.9 (Cal.), 1990.
4. Summers v. United States, 905 F.2d at 1215.
5. *Sambrano v. City of San Diego*, 94 Cal.App.4th 225, 233-234, 114 Cal.Rptr.2d 151, Cal. App.4.Dist.
6. *Burton v. Dominion Nuclear Connecticut, Inc.*, 300 Conn. 542, 23 A.3d 1176 Conn., 2011, as cited by American Jurisprudence, 2nd Edition, Nuisances III.A.2.a., Section 58.
7. See Restatement (2nd) of Torts, Section 821B.
8. See, e.g., "Beach Fires Relegated to Specific Evening Hours; May Soon Be Banned at Lifeguard Bathing Beaches." Hamptons.com, July 20, 2009 by Aaron Boyd.
9. News Release of November 9, 2011 from State of Oregon, Department of Environmental Quality at www.deq.state.or.us/news/prDisplay.asp?docID=3739.
10. Revised Regulatory Impact Statement, Page 3, Lines 10 through 16.
11. Department of Environmental Conservation, Questions and Answers Regarding Open Burning, Regulations Effective October 14, 2009, Page 1, Line 15 through 22, accessed at http://www.dec.ny.gov/chemical/58519.html.
12. Recreational Fires in Washington State, Prevention Division, Spokane County Fire District Nine, Page 1, Paragraphs 1, 2 and 4.
13. Ordinance Number 05-020 Section 11, August 16, 2005, Palm Beach County Open Burning Ordinance.
14. See also State of North Carolina, Department of Environmental and Natural Resources, Division of Air Quality—News and Public Outreach—Brochures and Related Materials—May 13, 2009: North Carolina Administrative Code Section .1900-Open Burning; 15 NCACO2D.1901, 1902—interview with Thomas Mather, Public Information Officer, North Carolina Department of Environmental and Natural Resources, Division of Air Quality, Interview of September 20, 2013.
15. See also Texas Administrative Code, Title 30, Part 1, Chapter 111, Subchapter B, Rule XXX Section 111.207—Exception for Fires Used for Recreation, Ceremony, Cooking and Warmth.
16. Interview with Joseph Janecka of September 19, 2013—Texas Commission on Environmental Quality.
17. South Coast Air Quality Management District Staff Report for July 12, 2013 Meeting, Agenda Item No. 1, Proposal: Amend Rule 444 - Open Burning and Issue RFP for Low Emission Non-Wood Beach-Type Fire Ring Demonstration, Page 2, Paragraph 1.
18. South Coast Air Quality Management District Staff Report for Board Meeting of July 12, 2013, Agenda No. 1,Page 15.
19. Ibid. Pages 4 through 5.
20. Ibid. Addendum to Draft Final Staff Report, Page 6, Paragraph 3.
21. Ibid. Attachment D, Key Issues and SCAQMD Staff Responses, Page 6.
22. California Civil Code §3479.

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23. California Civil Code §3480.

24. California Civil Code §3481.

25. "Validity of Regulation of Smoke and Other Air Pollution" by E. H. Schopler. 78 ALR 2nd at 1305 (Updated), Section 2, Page 5.

26. 78 ALR 2nd at 1305, Section 4 (with annotations).

27. South Coast Air Quality Management District draft staff report for proposed amended rules 445 and 444. Appendix A, Page A-5, Paragraphs 4 and 5.

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